No. 93-1935

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that inherent in an express reservation of the sponsor's right to amend the plan?

2. Does the validity of an amendment incorporated in an ERISA plan document depend on whether the plan contains an amendment procedure complying with ERISA § 402(b)(3)?

3. Does a procedural violation of ERISA, such as the absence of an amendment procedure in the plan, that causes no harm to plan participants give rise to a substantive remedy affecting benefit entitlements?

PARTIES TO THE PROCEEDING

All parties to the proceedings below are parties before this Court. The named respondents are Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard Abbamont, and Olga Wolsey. The named respondents represent a class consisting of retired, nonbargaining-unit employees from petitioner's former Wood-Ridge, New Jersey, facility.

The petitioner is Curtiss-Wright Corporation. Pursuant to Rule 29.1 of the Rules of the Court, petitioner states, as previously stated in its petition, that it has no parent or subsidiary corporations (except wholly owned subsidiaries).

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey are not reported. (Pet. App. 34, 42).[1] The original opinion of the United States Court of Appeals for the Third Circuit, issued December 28, 1993, and its March 3, 1994 order granting rehearing and vacating its original opinion are unreported. (Pet. App. 17, 107). Its final opinion is reported at 18 F.3d 1034. (Pet. App. 1).

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[1] "Pet. App." refers to the Appendix to the Petition. "J.A." refers to the Joint Appendix filed with this brief. "C.A. App." refers to the Joint Appendix filed with the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals as to which review is sought was entered on March 3, 1994. (Pet. App. 1, 111). The petition for writ of certiorari was filed on June 1, 1994, and was granted on September 26, 1994. (J.A. 80). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, are set forth in the appendix to this brief.

STATEMENT OF THE CASE

1. Introduction

This case arises from a plan sponsor's termination of non-vested employee welfare benefits under a voluntarily adopted plan. On November 30, 1983, petitioner, Curtiss-Wright Corporation ("Curtiss-Wright" or the "Company"), terminated plan health insurance benefits for respondents and other non-bargaining-unit retirees from its Wood-Ridge, New Jersey, facility when it closed that facility due to the loss of a military contract essential to its continued operation.[2] (Pet. App. 3, 6; C.A. App. 778-79, 1102-03). Respondents filed a complaint in the United States District Court for the District of New Jersey, in which they asserted a claim for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). After a bench trial, the District Court found that plaintiffs' health insurance benefits had not vested. Nonetheless, it held that the termination of those benefits was unlawful, concluding that the amendment authorizing the termination of benefits was invalid

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[2] Under the plan, all affected retirees had the option of converting to individual policies. (J.A. 49).

because the plan did not contain an amendment procedure complying with ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3). The court entered judgment awarding $2,681,086 in past health insurance benefits to plaintiffs. On Curtiss-Wright's appeal and plaintiffs' cross-appeal, the United States Court of Appeals for the Third Circuit affirmed.

2. The Curtiss-Wright Welfare Benefits Plan

In 1966, Curtiss-Wright unilaterally began providing health insurance benefits to nonbargaining-unit retirees from its Wood-Ridge, New Jersey, facility. (Pet. App. 115-16). Over the years, Curtiss-Wright periodically changed both insurance carriers and the terms of coverage. One thing never changed: As stated in summaries distributed to participants and in other documents, Curtiss-Wright always retained the right to modify or terminate benefits. (Pet. App. 116-18; C.A. App. 173, 228, 277, 287, 296-97, 357).

In 1976, in order to bring its benefit plans into compliance with ERISA, Curtiss-Wright established a Constitution as a general plan instrument. (Pet. App. 4; J.A. 34). In addition to reserving "the Company's" right to terminate the plan "for any reason at any time," the Constitution provided:

> The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan.

(Pet. App. 4; J.A. 37-38). Various documents distributed to participants reiterated these reservations of rights. (Pet. App. 4-5, 35-36, 67-69).

The Constitution incorporated as plan documents other materials setting forth the terms and conditions of benefits more specifically, including current summary plan descriptions. (Pet. App. 4; J.A. 69, 76; C.A. App. 1252).

3. The Amendment at Issue

In early 1983, Curtiss-Wright, as it had done in the past, issued a revised plan description in connection with a switch in insurance carriers. The District Court found that this 1983 plan description was "the governing document" setting forth the terms of the plan applicable to plaintiffs. (Pet. App. 38).

Among other changes, this 1983 plan document set forth the amendment at issue:

> Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired.

(Pet. App. 5-6; J.A. 49). The revised plan description, and this language in particular, was drafted by the Company's Corporate Director of Benefits, Richard DuBois, and its Labor Counsel, Aaron J. Carr; and it was reviewed and approved as part of the plan by the Company's Executive Vice President, Charles Ehinger. (J.A. 69-70, 73-74, 77-78). These were the executives responsible for administering the plan and the same executives (or, in Mr. DuBois' case, his predecessor) who had established the plan Constitution in 1976. (*Id.*; C.A. App. 1231).[3]

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[3] Messrs. DuBois and Carr testified at trial that because Curtiss-Wright already had reserved the right to terminate the plan "for any reason at any time" (J.A. 38), they regarded the termination language added in 1983 as a "clarification" of Curtiss-Wright's existing rights under the plan, rather than the creation of a new right. (J.A. 70-71, 79). Both were unequivocal, however, that this language was intended—like the language in the previous plan descriptions it replaced—to be part of the plan terms. (J.A. 69, 70-71, 77). And, as the District Court found, the document to which this language was added was "the governing document" of the plan. (Pet. App. 36, 38-39).

Curtiss-Wright had a business reason for linking the continuation of retiree benefits for a particular facility to the continued operation of that facility. Health benefits for each facility's employees and retirees were supported by and charged to that facility's ongoing contracts (almost all of which were government defense contracts) as overhead. (Pet. App. 115-16). Thus, as an inherent aspect of the plan, the continuation of health benefits depended on the continued operation of the relevant facility.

4. The Termination of Benefits

After losing a military contract vital to the continued operation of the Wood-Ridge facility, Curtiss-Wright closed the facility effective November 30, 1983. (J.A. 56-59; C.A. App. 719). Curtiss-Wright previously had notified the affected retirees that the Wood-Ridge facility was being closed and that health insurance benefits therefore would be terminated. (*Id.*). All affected retirees were given the option of converting to individual policies. (*Id.*).

5. The District Court Decision

After trial, the District Court, as trier of fact, found that Curtiss-Wright had reserved before 1983 the rights to terminate or amend the plan and held that plaintiffs' benefits had not vested. (Pet. App. 35-36). The District Court concluded, however, that the lawfulness of the termination of plaintiffs' benefits depended on the validity of the 1983 amendment. (Pet. App. 37). Although it found that the amendment had been incorporated in a "governing document" of the plan applying to plaintiffs and that plaintiffs had received timely notice of the amendment, the District Court held that the amendment was invalid because the plan did not provide an amendment procedure as required by ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3). (Pet. App. 37-39). The District Court entered judgment requiring Curtiss-Wright to pay $2,681,086 in past benefits to plaintiffs. (Pet. App. 105).

6. The Court of Appeals Decisions

On Curtiss-Wright's appeal and plaintiffs' cross-appeal, the Court of Appeals for the Third Circuit affirmed the District Court's judgment. (Pet. App. 16). The Court of Appeals agreed that Curtiss-Wright had reserved the rights to amend or terminate the plan and that plaintiffs' benefits had not vested. (Pet. App. 2, 13-15). But it also agreed that Curtiss-Wright did not properly terminate those benefits. (Pet. App. 2, 12).

In its original opinion, filed December 28, 1993, the Court of Appeals rejected Curtiss-Wright's argument that its express reservation of the right to terminate the plan for any reason encompassed the lesser right to terminate plaintiffs' benefits without amending the plan because, the court reasoned, Curtiss-Wright would still have been required to comply with "termination procedures" prescribed under ERISA § 4041(b), 29 U.S.C. § 1341(b). (Pet. App. 23-25). On rehearing, the Court of Appeals vacated its original decision and issued a new opinion, no longer relying on § 4041(b). Instead, the court rejected the argument by construing ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1), to require "notice of plan termination,"[4] and finding that the notice provided to plaintiffs of the amendment and of the termination of their benefits did not constitute such notice. (Pet. App. 12). The rest of the court's decision remained unchanged.

The Court of Appeals affirmed the District Court's finding of a violation of § 402(b)(3), which requires a procedure for amendment and "identifying the persons who have authority to amend the plan." Although ERISA § 3(9), 29 U.S.C. § 1002(9), defines "person" to include a "corporation," the Court of Appeals held that Curtiss-Wright's plan violated § 402(b)(3) because it provided for amendment by "the Company" rather than by specific individuals. (Pet. App. 8). Although the amendment had been incorporated in a plan document distributed to plan participants, the court reasoned that the statutory purpose of ensuring that participants can rely on the plan documents required striking the amendment. (Pet. App. 10-11). To invalidate the amendment, the court relied exclusively on its conclusion that the plan failed to comply with § 402(b)(3), effectively acknowledging that the amendment met all other prerequisites of a valid and effective amendment. (Pet. App. 9-11, 14-15 & n.4).

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[4] On its face, ERISA § 104(b)(1) sets forth no such requirement.

SUMMARY OF ARGUMENT

By holding that the amendment procedure in Curtiss-Wright's employee welfare benefit plan failed to comply with § 402(b)(3) of ERISA and that the amendment at issue was invalid, the decision below unsettles countless plans. Many pension and welfare plans—including any that follow the prototype language published by the Internal Revenue Service—have amendment provisions substantively identical to the one in Curtiss-Wright's plan. Under the decision below, all of those plans violate § 402(b)(3). Many, if not all, of those plans also have been amended over the years. Under the decision below, the terms of any such plans are now uncertain: Any amendments—including those that for years have been included in the plan documents and followed as controlling plan terms—may be invalid. This result contravenes ERISA for several reasons.

1. A plan that expressly reserves the plan sponsor's right to amend, and so provides for amendment by the sponsor, does not violate § 402(b)(3). The Court of Appeals held to the contrary by creating a requirement not imposed by the statute: that plans identify the individuals within a company or other sponsoring organization who may exercise its amendment authority. This construction conflicts with the plain language of the statute. Section 402(b)(3) requires only a procedure for identifying "persons" with amendment authority, and ERISA defines "person" to include corporations and other entities. ERISA § 3(9), 29 U.S.C. § 1002(9). It also conflicts with the interpretation of § 402(b)(3) by the Internal Revenue Service, whose own prototype pension plan amendment provision is nearly identical to the one set forth in Curtiss-Wright's welfare benefit plan. Further, the amendment provisions in Curtiss-Wright's plan and in the IRS prototype plan fulfill the fundamental purpose of § 402(b)(3): to promote the identification of amendments. To plan participants, a company's publication

of revised plan documents is unmistakably an amendment of the plan terms by the company.

2. Even if there had been a violation of § 402(b)(3) in this case, that should not give rise to the remedy of striking an amendment from the plan documents.

a. The validity of an amendment does not depend on the plan's compliance with § 402(b)(3). *See Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291, 295 (4th Cir. 1993). Neither the statute's text nor its purpose requires otherwise. Instead, following analogous principles of trust law, when the plan instrument does not contain an amendment procedure, the validity of an amendment should be determined based on whether the amendment was promulgated in a way that sufficiently manifests the intent that it be a term of the plan. *See Biggers, supra* (citing *Restatement, Second, of Trusts* § 331). There is no clearer way for this to be done, nor is there a way more consistent with the purposes of § 402(b)(3) or ERISA as a whole, than for a plan sponsor to promulgate and publish an amendment by revising the governing document of the plan.

b. Instead of serving the purpose of ERISA, the remedy created by the Court of Appeals in this case weakens two fundamental statutory policies. First, ERISA's remedial provisions reflect a careful balancing of the regulation of benefit plans and the costs of compliance. *See, e.g., Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 2072, 124 L.Ed.2d 161, 174 (1993). The decision below upsets this balance by failing to distinguish between a violation of § 402(b)(3) that causes substantive harm and one that does not. The violation found caused no harm to any plan participant because the amendment conformed with the plan's express reservation of the right to amend and was set forth in the plan's published governing document. The remedy holds Curtiss-Wright liable for doing what it had the acknowledged right to do under

ERISA and the plan: terminate nonvested welfare benefits. The decision below thereby would impose liability without regard to harm. The result is precisely what Congress sought to avoid: undue costs and liabilities that provide employers with substantial disincentives against creating or maintaining benefit plans at all.

c. Second, ERISA's written instrument and disclosure requirements seek to ensure that the current plan terms are defined in the current plan documents. That is essential to the ability of participants, as well as sponsors, fiduciaries, and administrators, to know precisely what their respective rights and obligations are under their plans. Indeed, without that certainty, the sponsorship and administration of benefit plans becomes a dangerous enterprise, fraught with unforeseeable potential risks and liabilities. By striking an amendment set forth as a plan term in the governing plan document, the decision below erodes the integrity of the plan documents. Contrary to ERISA's design, the plan documents are no longer dispositive of the plan terms.

The remedy fashioned by the Court of Appeals is not required by § 402(b)(3) and disserves the broader policies of ERISA. Since the consequence of a failure to comply with § 402(b)(3) is not expressly defined by ERISA, it should be defined by reference to these basic policies.

ARGUMENT

I. An Express Reservation of the Plan Sponsor's Right to Amend the Plan Satisfies § 402(b)(3) of ERISA.

Section 402(b)(3) of ERISA requires that every employee benefit plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." The statute does not define what type of procedure must be set forth, nor does it require a detailed procedure.

To hold that Curtiss-Wright's plan did not comply with § 402(b)(3), the Third Circuit interpreted the statute to require the designation of specific individuals with amendment authority. The court previously had held that a reservation of the right to amend may itself set forth a general procedure for amendment—specifically, that the reservation "the Trustees may amend or modify this plan" effectively set forth the amendment procedure "modification by 'the Trustees.' "[5] Here, the amendment procedure thus set forth by Curtiss-Wright's plan was amendment "by the Company." The Third Circuit reasoned, however, that this procedure failed to satisfy § 402(b)(3) because it did not identify "what individuals or bodies within the Company could promulgate an effective amendment." (Pet. App. 8). In this way, the court distinguished the procedure "by the Company" from procedures such as "by the Trustees" or "by the Board of Directors." (*Id.*)

This interpretation of § 402(b)(3) ignores the plain language of the statute. Section 402(b)(3) requires a procedure for identifying "persons" with amendment authority. "Person" is a defined term under ERISA; it specifically includes corporations and other entities that could be plan sponsors. ERISA § 3(9), 29 U.S.C. § 1002(9). Thus, § 402(b)(3) expressly allows a plan to identify the corporate sponsor (or other sponsoring organization), without more, as the "person" with amendment authority. Nothing in the statute requires a plan to identify further, by name or title, specific individuals within the corporation who may execute its amendment authority.

Further support is found in the interpretation of § 402(b)(3) by the Internal Revenue Service. The IRS has construed the statute to require no more than the general procedure inherent in an express reservation of the right to amend. Thus, its prototype pension plan provides as to amendment only that

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[5] *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 105-06 (3d Cir. 1990), *petition dismissed pursuant to Rule 46*, 61 U.S.L.W. 3523 (1993).

"the sponsoring organization may amend any part of the plan." 2 *Pension Coordinator* ¶ 13,181 at 13,276R-124 (R.I.A. 1994).[6] The IRS prototype plan thus reflects the agency's view that "by the sponsoring organization" or "by the Company" sufficiently identifies both the person with authority to amend and the procedure for amendment.[7] The IRS shares responsibility for the administration and enforcement of ERISA,[8] and its prototype plan, like the published Revenue Procedures of which the prototype is a part, reflects an official interpretation of the statute.[9] Its view of § 402(b)(3), therefore, is entitled to considerable deference. *See Mead Corporation v. Tilley*, 490 U.S. 714, 722 (1989).

The IRS interpretation accords with the purpose of § 402(b)(3). The statute's purpose is to promote the clear identification of amendments. *See* pp. 17-20, *infra*. Participants and fiduciaries must be able to know both that the plan has been amended and what the new terms are. As this case reflects, a procedure for amendment "by the Company" may fulfill that purpose just as effectively as a more specific pro-

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[6] Reprinting the IRS List of Required Modifications form distributed to sponsors of master and prototype pension benefit plans, as derived from Rev. Proc. 89-9, 1989-1 C.B. 780.

[7] *See also Godwin v. Sun Life Assur. Co.*, 980 F.2d 323, 327 n.10 (5th Cir. 1992) (finding that the "amendment procedure, in general, was proper" where the plan document authorized written amendments "if agreed to by a representative of the company," although the court did not address § 402(b)(3) specifically); *Musto v. American General Corp.*, 861 F.2d 897, 901 (6th Cir. 1988) (upholding validity of an amendment to a welfare benefit plan where the plan document provided for amendment "by announcement of Company"), *cert. denied*, 490 U.S. 1020 (1989).

[8] Under Title II of ERISA, the Treasury Department exercises authority jointly with the Department of Labor. *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517-18 & n.13 (1981).

[9] *See* 2 *Pension Coordinator, supra*, ¶ 13,181 at 13,276R-1. *See also* 26 C.F.R. § 601.601(d); Rev. Proc. 89-14, 1989-1 C.B. 814.

cedure. The amendment in question was promulgated by the revision of the plan's governing document. The revised plan document was drafted, reviewed, approved, published, and distributed by the responsible Company executives—up to and including the Company's Executive Vice President. (J.A. 69-71, 73-74, 77-78). As far as the benefit plan was concerned, the actions of these executives were the actions of the Company; in fact, the same executives had established the plan Constitution in 1976 and indisputably were the executives responsible for administering the plan on behalf of the Company. (*Id.*)[10] Further, the revised plan document was distributed to participants by Curtiss-Wright and available at its benefits office. (J.A. 43, 69; C.A. App. 1188). From the perspective of plan participants, the revised plan document could only be understood as an amendment of the plan terms "by the Company."

A plan sponsor may, of course, limit its amendment power more specifically than did Curtiss-Wright. It may, for example, confine the power to particular individuals named in the plan or require various procedural bells and whistles. But nothing in § 402(b)(3) precludes the more general approach adopted by the IRS in its prototype plan, by Curtiss-Wright in the plan at issue here, and by countless other plan sponsors in their plans.[11] We submit, therefore, that the court below erred

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[10] *See, e.g., Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12, 15 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984). There, the plan provided for termination "by the company," *i.e.*, the plan sponsor, but did not "requir[e] the company to manifest its action in any particular manner." The court held that action by the company's vice president complied with the plan.

[11] *See, e.g.*, Sherwin P. Simmons, "Third Circuit Shocks Pension Practioners," 63 Tax Notes 335 (April 18, 1994); K.P. O'Brien & L. Meyer, "Selective Developments Affecting Qualified Plans: Of Same Desks, Plan Spinoffs and Mergers, and Plan Procedures," NYU 52d Inst. on Fed. Tax.—Employee Benefits & Executive Compensation § 10.04, at pp. 10-22 to 10-23 (Matthew Bender 1994) (hereinafter "O'Brien & Meyer").

by concluding that the amendment provision in Curtiss-Wright's plan failed to comply with § 402(b)(3).

In opposition to the petition for certiorari, plaintiffs sought to avoid the issues presented for review by contending that Curtiss-Wright had not effectively amended the plan whether or not the plan complied with § 402(b)(3). To invalidate Curtiss-Wright's amendment of the plan, however, the Third Circuit relied exclusively on its conclusion that the plan failed to comply with § 402(b)(3). While the court repeatedly had declined to decide the validity of plan amendments based on compliance with § 402(b)(3) when it was not necessary to do so, the court here concluded that "this case requires that we now reach that issue." (Pet. App. 9-10). The court thereby acknowledged that Curtiss-Wright's amendment met all other prerequisites of a valid amendment. (*See also* Pet. App. 9 n.4). The questions presented to this Court for review therefore are properly limited to those involving the construction and effect of § 402(b)(3).

The record confirms the inconsequence of plaintiffs' arguments. First, plaintiffs contended that Curtiss-Wright failed to comply with an unwritten practice identified at trial by its Corporate Director of Benefits, Mr. DuBois—that the plan would be amended by "work[ing] through" Curtiss-Wright's legal department and an executive committee. (J.A. 72-73). Any such unwritten practice, however, would not be part of the plan[12] and so could not define the validity of plan amendments incorporated by the plan sponsor in the plan documents. In any event, Mr. DuBois's testimony also reflects that the unwritten practice he identified had been followed in this case because the amendment had been promulgated by the legal department and executive committee members, specifically, Messrs. DuBois, Carr, and Ehinger. (J.A. 73-74).

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12 *See* ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), which requires that every employee benefit plan be in writing.

Second, plaintiffs contended that Curtiss-Wright intended the termination language added to the plan to be a "clarification" rather than an "amendment." But the point under ERISA is what Curtiss-Wright did in the governing plan document, not how it may or may not have subjectively characterized what it did. Plan participants would only know and be affected by the former. Further, Messrs. Carr and DuBois testified that the revised language was intended—like the language in the previous plan descriptions that it replaced—to be part of the plan terms. (*See* p. 4 n.3, *supra*). The District Court agreed, recognizing that the language was added to the governing plan document and intended to be a plan term (Pet. App. 36-37), and the Court of Appeals recognized that Curtiss-Wright satisfied all requirements for a valid amendment other than compliance with § 402(b)(3). (Pet. App. 9-10 & n.4). In this context, whatever theoretical distinction might lie in calling the revision an amendment or a clarification is immaterial. What matters is that the plan terms as set forth in the governing plan document were revised by the Company. Thus, the plan was amended pursuant to the plan's amendment procedure.

II. The Validity of an Amendment Incorporated in the Plan Documents Does Not Depend on Compliance with § 402(b)(3) of ERISA.

A. Neither the Text nor the Purpose of the Statute Conditions the Validity of an Amendment on a Plan's Compliance with § 402(b)(3).

This Court itself has refused to rewrite ERISA by inferring obligations and remedies Congress did not expressly provide. *See Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (holding that ERISA § 502(a)(3) does not authorize an action for money damages against a nonfiduciary who allegedly participated in the plan fiduciaries' wrong); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147-48 (1985) (holding that ERISA

§ 409(a) does not authorize an action by a plan participant for extra-contractual damages). The decision below, however, does just that. It creates a draconian remedy for noncompliance with § 402(b)(3)—automatic invalidation of plan amendments—nowhere found in the statute.

On its face, § 402(b)(3) does not require this remedy. The statute addresses neither the validity of plan amendments nor an employer's right to amend; it sets forth only a disclosure content requirement. Nor does effective enforcement of § 402(b)(3) require the automatic invalidation of plan amendments. A participant or the Secretary of Labor, for example, can sue under § 502(a)(3) or § 502(a)(5) for injunctive relief compelling a plan sponsor to set forth a procedure for amendment in the plan documents. 29 U.S.C. §§ 1132(a)(3), 1132(a)(5). Thus, ERISA expressly provides equitable remedies to correct the deficiency—the absence of an amendment procedure—without interfering with the administration of the plan or unduly burdening the plan sponsor.

Following the plain language of the statute, two Courts of Appeals have held that the validity of an amendment does not depend on the plan's compliance with § 402(b)(3). In *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), the Court of Appeals for the Sixth Circuit upheld an amendment to a severance benefit plan that, since it previously had been unwritten, contained no amendment provision at all. The court found nothing in § 402(b)(3) requiring that the amendment be automatically invalidated:

> We do not believe . . . that Congress intended that any plan failing to comply with section 1102(b) [ERISA § 402(b)] would, for that reason alone, become unamendable. Plaintiffs have failed to show any detrimental reliance based on the defendant's failure to comply with section 1102(b), and, under these circumstances, we decline to impose the substantive remedy of prohibiting

> plan amendment in response to defendant's procedural violations.

905 F.2d at 949. *See, e.g., Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252-53 (1st Cir. 1984) (per Breyer, J.) (holding that a plaintiff seeking relief for a disclosure violation under ERISA "must show some significant reliance upon, or possible prejudice flowing from," the violation).[13]

In *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291 (4th Cir. 1993), the issue arose again in the context of a severance benefit plan that contained no amendment provision and, therefore, failed to comply with § 402(b)(3). The Court of Appeals for the Fourth Circuit agreed with the conclusion in *Adams* that the validity of an amendment does not depend on compliance with § 402(b)(3). 4 F.3d at 295. As did this Court in *Firestone Tire & Rubber Corp. v. Bruch*, 489 U.S. 101, 110-11 (1989), the Court then looked to analogous trust principles for guidance:

> A situation much like the one before us occurs in trust law when a settlor reserves the power to modify or revoke a trust, but fails to specify a method for implementing changes. If such power is reserved, then the settlor may exercise the power in any manner that "sufficiently manifests his intention to modify the trust."

4 F.3d at 295, quoting *Restatement, Second, of Trusts* § 331, comment c. *See also* G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 993 at pp. 233-39 (2d rev. ed. 1983); W. Fratcher, *Scott on Trusts* § 331 at pp. 378-81 (4th ed. 1989).

Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan, 947 F.2d 246 (7th Cir. 1991), cited by the court below (Pet. App. 10-11), comports with *Biggers* and *Adams*. The

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[13] *Accord, e.g., Lewandowski v. Occidental Chemical Corp.*, 986 F.2d 1006, 1008-10 (6th Cir. 1993); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743-44 (7th Cir. 1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1167-70 (3d Cir. 1990); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353-54 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985).

Seventh Circuit there invalidated a putative amendment, not set forth in the plan documents, that conflicted with an amendment procedure expressly set forth in the plan as a "limitation on amendments." 947 F.2d at 254-55. As in *Biggers*, trust principles supplied the rule:

> If the settlor reserves a power to modify the trust only in a particular manner or under particular circumstances, he can modify the trust only in that manner or under those circumstances.

947 F.2d at 254, quoting *Restatement, Second, of Trusts* § 331, comment d. Thus, the court never suggested that a failure to comply with § 402(b)(3) prohibits plan amendments. To the contrary, the court upheld another amendment despite an apparent violation of § 402(b)(3): After noting that the plan before it did not provide an amendment procedure for certain types of amendments, the court held that such an amendment was valid. Again, the Seventh Circuit determined the validity of the amendment by looking to whether it conflicted with the plan documents, not to whether the plan complied with § 402(b)(3). *See Murphy v. Keystone Steel & Wire Co.*, 850 F. Supp. 1367, 1381 (C.D. Ill. 1994) (concluding that the Seventh Circuit would reject *Schoonejongen* and follow *Biggers* and *Adams*, and upholding an amendment despite the absence of an amendment procedure), *appeal pending*, No. 94-2292 (7th Cir.) *See also* O'Brien & L. Meyer, *supra* p. 12 n.11, §§ 10.04 [2][b] and [c] at pp. 10-23 to 10-30 (concluding that *Biggers*, *Adams*, and *Murphy* follow "a more reasonable approach to § 402(b)(3)" than does the Third Circuit's decision here).

The purpose of § 402(b)(3) confirms that the statute does not require striking an amendment incorporated in the plan documents. This section complements ERISA § 402(a)(1), which provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Although no legislative history addresses the purpose of § 402(b)(3) directly, that purpose is

inseparable from the function of the "written instrument" requirement: "that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." H.R. Conf. Rep. No. 1280, 93d Cong. 2d Sess. 297 (1974), *reprinted in* 3 Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of ERISA 4518, 4564 (Comm. Print 1976) (hereinafter "Legislative History"), and 1974 U.S. Code Cong. & Admin. News 5038, 5077-78.

Section 402(b)(3) potentially contributes to this end by promoting the identification of amendments not yet incorporated in the plan documents, specifically, by identifying the source of any such amendments. *See, e.g., Huber v. Casablanca Industries, Inc., supra*, 916 F.2d at 106 (upholding the enforcement of an amendment made by resolution of the plan's board of trustees but not added to the plan documents). This potential role of § 402(b)(3) is apparent from what otherwise would be a gap in ERISA's written instrument and disclosure requirements. ERISA allows substantial time lags between the adoption of amendments and their dissemination and incorporation in plan documents. A "material modification" need not be filed with the Secretary of Labor until 60 days after it is made, and a summary description of the modification need not be sent to participants until 210 days after the end of the plan year in which it is made. ERISA §§ 102(a)(1), 102(a)(2), 104(a)(1)(D), 104(b)(1), 29 U.S.C. §§ 1022(a)(1), 1022(a)(2), 1024(a)(1)(D), 1024(b)(1). Even then, neither the plan description nor the summary plan description need be revised to reflect the amendment; ERISA permits up to five years for that. ERISA §§ 104(a)(1)(B), 104(b)(1), 29 U.S.C. §§ 1024(a)(1)(B), 1024(b)(1). This was something new under ERISA. Its predecessor, the Welfare and Pension Plans Disclosure Act, required that plan amendments be published and included in the plan description "upon their effective date." Pub. L. No. 85-836, §§ 6(b), 8(a)(2), 72 Stat. 997 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 1172, 1175-76, 1178, *repealed by*

29 U.S.C. § 1031(a)(1). Section 402(b)(3) can best be understood as a corollary to this innovation.[14]

Thus, § 402(b)(3) is relevant only to amendments that have been adopted but not yet included in the plan documents. Once amendments are incorporated in the plan documents, the role of § 402(b)(3) is completed. There is no longer any need to look to a source identified in the plan amendment procedure to find out whether the plan terms as set forth in the plan documents have been changed. A participant may ascertain the plan terms, as amended, by looking at the plan documents. Indeed, revising the plan description—as Curtiss-Wright did here—is a prescribed method of informing both participants

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[14] The House and Senate versions of H.R. 2, the bill leading to ERISA, similarly provided that "[a]ll amendments to the plan shall be included in the [plan] description on or after the effective date of such amendments." H.R. 2 (as passed in House), 93d Cong., 2d Sess. § 103(b), *reprinted in* 3 Legislative History 3898, 3921; H.R. 2 (as passed in Senate), 93d Cong., 2d Sess. § 502(m), *reprinted in* 3 Legislative History 3599, 3752.

Like the WPPDA, the House and Senate versions of H.R. 2 would not have required plans to contain procedures for amendment or for identifying the person with amendment authority. The House bill did provide, in conjunction with requiring that a plan be in writing, that the plan designate an administrator who would have the authority to make certain amendments. H.R. 2 (as passed in House), 93d Cong., 2d Sess. § 111(a)(1), *reprinted in* 3 Legislative History 3898, 3947-48. The bill also provided, however, that absent such a designation, the employer would be considered the administrator for purposes of § 111. *Id.*, § 3(16), *reprinted in* 3 Legislative History 3898, 3907-08.

The suggestion that plans set forth procedures for amendment and identifying persons with amendment authority first appears in a staff report to the House and Senate conferees on the different versions of H.R. 2. *See* Summary of Differences between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform, Part III, Fiduciary and Enforcement, at p. 12 (June 12, 1974), *reprinted in* 3 Legislative History 5249, 5262. Neither the staff report nor the subsequent conference report, H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 297 (1974), *reprinted in* 3 Legislative History 4518, 4564 and 1974 U.S. Code Cong. & Admin. News 5038, 5078, explains the reason for this provision.

and the Secretary of Labor that the plan has been amended. *See* 29 C.F.R. §§ 2520.104a-4(b)(2) and 2520.104b-3(b). *See also Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) ("The SPD is the statutorily established means of informing participants of the terms of the plan").

The Court of Appeals below identified a different purpose for § 402(b)(3): "that employees understand how their rights may be modified in the future." (Pet. App. 9 n.4). This cannot be reconciled with what Congress did. If Congress had been concerned with ensuring that employees know how their rights could be changed in the future, it logically would have required that plans contain procedures for plan termination as well as amendment; after all, a plan termination can modify rights to an even greater extent than a plan amendment. Congress imposed no such requirement.[15] The requirement that plans set forth procedures for amendment but not termination makes sense only if the purpose was to address a concern unique to plan amendments. That unique concern is that participants be able to ascertain the current terms of the plan on an ongoing basis. Section 402(b)(3) addresses that concern by enabling participants to identify amendments not yet incorporated in the plan documents.

The remedy created by the Third Circuit for a violation of § 402(b)(3) thus finds no basis in either the text or the purpose of the statute. If it is ever appropriate to fashion a remedy for a violation of § 402(b)(3) that ERISA does not

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[15] As part of Title IV, which addresses the insurance of certain pension benefits by the Pension Benefit Guaranty Corporation, ERISA requires only that terminations of pension plans subject to Title IV comply with certain procedures set forth in the statute. *See, e.g.*, ERISA §§ 4041-48, 29 U.S.C. §§ 1341-48. ERISA does not otherwise address the termination of either pension or welfare benefit plans. While the Third Circuit construed ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1), to require "notice of plan termination" for all plans, *see* p. 6, *supra*, the statute sets forth no such requirement.

expressly provide, that remedy must be tailored to the statute's purposes. When a sponsor goes beyond the minimum demands of Title I of ERISA and promulgates an amendment by revising the plan documents distributed to participants, there is no gap between the amendment's adoption and its incorporation in the plan documents. The goal of ensuring that participants may determine their rights by examining the plan documents is fulfilled without reference to § 402(b)(3). As a result, whether or not the plan complies with § 402(b)(3) should not affect the validity of the amendment.

B. Striking a Plan Amendment for a Violation of § 402(b)(3) that Caused No Harm to Plan Participants Upsets the Balance between Regulation and Costs of Compliance under ERISA.

ERISA carefully balances the regulation of benefit plans and the costs of compliance. "There is a 'tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.' " *Mertens v. Hewitt Associates*, *supra*, 508 U.S. at ___, 113 S.Ct. at 2072, 124 L.Ed.2d at 174 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981); bracketed material added by the Court). Congress was concerned lest excessive costs discourage employers from offering and maintaining benefit plans at all. *See*, *e.g.*, H.R. Rep. No. 533, 93d Cong., 2d Sess. 1-2 (1974), *reprinted in* 2 Legislative History 2348, 2348-49 and 1974 U.S. Code Cong. & Admin. News 4639, 4639-40 (Educ. and Labor Comm.); S. Rep. No. 383, 93d Cong., 2d Sess. 1 (1974), *reprinted in* 1 Legislative History 1069, 1069 and 1974 U.S. Code Cong. & Admin. News 4890, 4890 (Finance Comm.) *See also Alessi*, *supra*, 451 U.S. at 515.

This balance is fundamental both to ERISA's vesting requirements and its remedial scheme. For example, ERISA does not restrict the terminability of welfare benefits. *See Massachusetts v. Morash*, 490 U.S. 107, 119 (1989). Also, the statute circumscribes the remedies provided for noncompli-

ance with its regulatory provisions. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Thus, this Court has refused to create liabilities that ERISA does not expressly impose. *See Mertens v. Hewitt Associates*, *supra*; *Massachusetts Mut. Life Ins. Co. v. Russell*, *supra*. The same balance underlies holdings that procedural violations of ERISA do not give rise to substantive relief affecting benefit entitlements, at least not in the absence of specific harm. *See*, *e.g.*, *Govoni v. Bricklayers, Masons & Plasterers*, *supra*, 732 F.2d at 252, and other cases cited at p. 16 n.13, *supra*.

This case presents a stark example of how the statutory balance may be upset by judicial intervention. The only violation found below was that Curtiss-Wright's plan provided for amendment by "the Company" instead of by specified individuals and did not have a sufficient amendment procedure. No participant was less informed of the possibility of amendment because of the violation found. To the contrary, the plan clearly set forth that it could be amended by Curtiss-Wright at any time. Nor was any participant less informed of the specific amendment at issue once it was made.[16] Indeed, the amendment was promulgated in a way that ensured disclosure: It was incorporated in a revised plan document available and distributed to participants. Nor was any participant less certain of the amendment's authority. From the perspective of participants reviewing the revised plan document issued by Curtiss-Wright, the revisions incorporated in that document could only have been perceived as made "by the Company" as plan sponsor.

Had there been compliance with the Third Circuit's construction of § 402(b)(3) in this case, plaintiffs would not have been better off at all. Under the Third Circuit's view, § 402(b)(3) would have been satisfied if Curtiss-Wright's plan

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[16] *Compare Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, *supra*, 947 F.2d at 255, where the Seventh Circuit invalidated an amendment that had not been incorporated in a plan document and of which the participants "appear[ed] not even to have received notice."

expressly had provided for amendment, for example, by the revision of the plan document by one or more specifically designated employees of the Company. But the end result indisputably would have been the same: The plan would have been amended by the revision of the plan document, the plan participants would have had notice of the amendment, and benefits subsequently would have terminated based on that amendment.

As a result, the liability imposed on Curtiss-Wright bears no relation to the violation found. The decision below holds the Company liable for $2,681,086 for terminating nonvested benefits. But plaintiffs' loss of those benefits did not flow from any violation of § 402(b)(3). To the contrary, the Third Circuit acknowledged that Curtiss-Wright always had the right to terminate plaintiffs' welfare benefits, which was expressly reserved in the plan, and that its termination of those benefits would have been upheld but for the violation found. (Pet. App. 14-15). No one has identified any harm to any plan participant from the plan's failure to specify a "person" other than "the Company" to amend the plan or otherwise to provide a more detailed amendment procedure.

For employee benefit plans in general, the Third Circuit's ruling thus has precisely the effect ERISA was intended to avoid. Employers are faced not only with the uncertainty of whether or not their plans comply with § 402(b)(3)—a distinction the court below holds to depend on differences as slight as that between a provision for amendment "by the Trustees" and for amendment "by the Company"[17]—but with the threat of immense liability for noncompliance. This possibility provides a substantial disincentive against creating and maintaining employee benefit plans.

A substantive remedy might be appropriate if a violation of § 402(b)(3) were to cause substantive harm to plan partici-

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[17] Pet. App. 8, distinguishing *Huber v. Casablanca Industries, Inc.*, *supra*.

pants. *See Biggers v. Wittek Industries, Inc.*, *supra*, 4 F.3d at 296 n.1; *Adams v. Avondale Industries, Inc.*, *supra*, 905 F.2d at 949. That might occur where, because there is no amendment procedure, a participant were to have neither actual nor constructive notice that a plan has been amended and were to rely to his detriment on outdated plan terms—for example, by believing that he has continued insurance coverage when he does not. That is not this case. The general rule laid down by the Third Circuit fails to correlate the remedy and the harm: In this case, there was no harm flowing from the violation found. Curtiss-Wright respectfully submits that, by elevating procedure over substance, the decision below upsets a critical balance underlying ERISA.

C. Striking an Amendment Set Forth in a Plan Document Erodes the Integrity of the Plan Documents.

As noted, § 402(b)(3) and the "written instrument" requirement of § 402(a)(1) serve a common purpose: to ensure that "every employee may, by examining the plan documents, determine exactly what his rights and obligations are under the plan." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 297 (1974), *reprinted in* 3 Legislative History 4518, 4564, and 1974 U.S. Code Cong. & Admin. News 5038, 5077-78. This common purpose reflects a compelling policy under ERISA. Thus, courts have held that the plan terms as set forth in the plan documents cannot be modified, invalidated, or otherwise disregarded based on ERISA reporting and disclosure violations. *See* cases cited at p. 16 & n.13, *supra*. Further, courts have held that the plan terms generally cannot be modified by informal communications. *See, e.g., Huber v. Casablanca Industries, Inc.*, *supra*, 916 F.2d at 106; *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988); *Nachwalter v. Christie*, 805 F.2d 956, 959-61 (11th Cir. 1986); *but see Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990).

The court below recognized this fundamental policy: "[T]he participants are entitled to rely upon the plan document as defining the benefits currently being provided." (Pet. App. 10). It further observed that § 402(b)(3) "provides certainty and protects participants against frustration of their legitimate expectations" by ensuring "that employees understand how their rights may be modified in the future." (Pet. App. 9 n.4, 10).

By striking an amendment set forth in the formal plan documents, however, the Third Circuit's decision takes away more certainty than it provides. Section 402(b)(3) promotes the clear identification of what statements are intended to amend the terms of an employee benefit plan. That purpose is fulfilled, however, once an amendment is incorporated as a plan term in the plan documents. *See* pp. 17-20, *supra*. By contrast, the potential invalidation of amendments incorporated in plan documents means that plan documents are no longer dispositive of plan terms. Participants cannot rely on the current plan documents because any variations from prior plan documents would have to be evaluated by reference to the manner by which the changes were made—a matter not reflected in the plan documents and often beyond an employee's ability to discover. A participant's dilemma is worsened because, once incorporated in the plan documents, an amendment is indistinguishable from other plan terms. The particular certainty the decision below seeks to ensure—participants' knowing precisely the procedure for modifying their rights in the future—provides little benefit if participants cannot rely on the current plan documents to ascertain the present plan terms.

The theory of the court below that its remedy "enforce[s] the plan as written" rather than alters the plan terms is not correct. (Pet. App. 10). The court reasoned that "[u]nless and until the written plan is altered in a manner, and by a person or persons, authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the orig-

inal plan." (*Id.*) The judgment affirmed below, however, does not enforce the terms of the plan as it was originally established—whether that would be when Curtiss-Wright first provided health benefits to its employees, when in 1966 it first provided health benefits to retired employees, or when in 1976 Curtiss-Wright established the plan instruments under ERISA. Instead, the plan terms purportedly enforced by the courts below are those set forth in the 1983 plan document, with the sole exception of the termination clause at issue. (Pet. App. 38). The plan terms as stated in that plan document vary in many particulars from those stated in previous documents. To apply the Third Circuit's reasoning consistently, each provision in the 1983 plan document would have to be compared with prior provisions; if it varies from those provisions, then its validity would have to be evaluated based on how the change was made. Indeed, if the decision below stands, all plan terms added by amendment are potentially vulnerable to being stricken judicially.

The Third Circuit attempts to confine its holding to amendments "advantageous to the sponsor's interest." (Pet. App. 11 n.5). This also fails to avoid the underlying problem, for at least two reasons. First, not all plan amendments may be easily categorized as advantageous to either the sponsor's or the participants' interests. Even an amendment terminating or limiting benefits for certain participants, such as the amendment at issue here, advantages other participants if it contributes to the continuation of the plan as a whole. Other amendments—such as a change in health insurance carriers that is accompanied by an increase in both maximum coverage amounts and deductibles—also defy categorization. Second, the integrity of the plan documents cannot depend on whether terms favor the sponsor or the participants. Participants are not the only ones entitled to rely on the plan documents. The plan sponsor is entitled to rely on plan documents

as fixing the extent of its obligations;[18] plan administrators and other fiduciaries are required to rely on the plan documents in fulfilling their responsibilities. Parties can rely on the current plan documents only if the terms set forth in those documents, whether advantageous or not, are the plan terms.[19]

The general rule announced below is too broad because it invalidates terms set forth in the plan documents. The statutory purpose is better served by the rule trust law provides: When the right to amend is reserved but no procedure for amendment specified, the validity of a putative amendment depends on whether there was "a clear manifestation of an intent to alter the policy or plan." *Biggers v. Wittek Industries, Inc.*, 4 F.3d at 295-96. From any perspective, and particularly that of a plan participant, there is no clearer manifestation of a plan sponsor's intent to amend a plan than its revision of the plan documents. Because Curtiss-Wright amended its welfare benefits plan by revision of the plan documents and pursuant to an express reservation of the right to amend, there was no basis to invalidate the amendment.

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[18] As are the stockholders, creditors, and other persons to whom a sponsor may be required to report its liabilities. *See, e.g.*, FAS 106.

[19] The Courts of Appeals have overwhelmingly acknowledged this by refusing to enforce informal, "extra-plan" communications allegedly modifying benefits from those provided under the plan documents—whether to increase or decrease benefit entitlements. *See* cases cited at p. 24, *supra*.

CONCLUSION

The judgment of the Court of Appeals should be reversed to the extent that it holds Curtiss-Wright liable for the termination of plaintiffs' employee welfare benefits.

Respectfully submitted,

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